

United States District Court  
Eastern District of California

Otmar Wittine,

Plaintiff,

vs.

F. T. Deschler, et al.,

Defendants.

No. Civ. S 03-1676 LKK PAN P

Findings and Recommendations

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Plaintiff was a prisoner when he filed his complaint but now is at liberty. He proceeds in forma pauperis and without counsel. June 17, 2005, plaintiff filed a second-amended complaint containing the same claim raised in his other complaints.

I have reviewed plaintiff's complaint pursuant to 28 U.S.C. § 1915A and find that it fails to state a cognizable claim.

To state a claim under 42 U.S.C. § 1983, plaintiff must allege an identified defendant deprived plaintiff of a right

1 secured to him by the Constitution or laws of the United States  
2 while acting under color of state law. West v. Atkins, 487 U.S.  
3 42, 48-49 (1988). Due process entitles a prisoner facing  
4 disciplinary measures and whose liberty interest is threatened to  
5 advance written notice of the charges, a hearing, written  
6 findings and reasons for the disciplinary action taken and, when  
7 it presents no security risk, permit the prisoner to call  
8 witnesses and present evidence in his defense. Wolff v.  
9 McDonnell, 418 U.S. 539, 563-566 (1974). California prisoners  
10 have a liberty interest in credits earned for good behavior. See  
11 Wolff, 418 U.S. at 558; 15 Cal. Admin. Code § 3043.

12 Plaintiff claims defendants denied him due process by  
13 forfeiting time credits as a disciplinary measure after a hearing  
14 held more than 30 days after the day the District Attorney  
15 notified the California Department of Corrections he did not  
16 intend to prosecute plaintiff based on the conduct for which  
17 plaintiff was disciplined. The 30-day time requirement is a  
18 creature of state law. See 15 Cal. Admin. Code § 3316.

19 I find plaintiff fails to state a claim upon which relief  
20 can be granted.

21 I recommend this action be dismissed. See Lopez v. Smith,  
22 203 F.3d 1122, 1128 (9th Cir. 2000) (indigent prisoner proceeding  
23 without counsel must be given leave to file amended complaint  
24 unless the court can rule out any possibility that the plaintiff  
25 could state a claim).

26 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these

1 findings and recommendations are submitted to the United States  
2 District Judge assigned to this case. Written objections may be  
3 filed within 20 days of service of these findings and  
4 recommendations. The document should be captioned "Objections to  
5 Magistrate Judge's Findings and Recommendations." The district  
6 judge may accept, reject, or modify these findings and  
7 recommendations in whole or in part.

8 Dated: August 4, 2005.

9 /s/ Peter A. Nowinski

10 PETER A. NOWINSKI

11 Magistrate Judge  
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